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# The Challenges for Asian Jurisdictions in the Development of International Criminal Justice

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# *The Challenge for Asian Jurisdictions in the Development of International Criminal Justice*

Mark Findlay\*

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## *Abstract*

The paper reviews the different frameworks for international criminal justice in which China's influence can be measured, or should be present, looking specifically at procedural traditions on which international criminal law and its jurisprudence are said to be based. Understanding China as a transitional hybrid criminal justice model undergoing radical transformation in its justice delivery and discourse, it is argued, assists significantly in forecasting where the synthesis of international criminal procedure may be heading. Attached to a re-interpretation and critique of individualised liability is the unpacking of China's in principle commitment to communitarian rights and social protection as a foundation for its criminal justice model. How might a similar normative direction influence the diversification and 'rights' perceptions of international criminal justice? In particular, in today's China, which is experiencing a rapid and relentless reconfiguration of communitarian identity and obligation, will collective rights commitments survive to influence the development of domestic criminal justice?

From a more formalist consideration of international criminal justice, the paper explores what 'alternative' global justice paradigms offer China, and vice versa. Speculation on the opportunities available to China in regional and international governance, through more constructive involvement with international criminal justice is proposed against a call for a wider consideration of rights paradigms in so far as they recognise community interests as well as individual integrity. The strain between these priorities reveals how Asian states could find it more difficult to administer domestic criminal justice in accordance with the rightful demands of international conventions.

## **I Introduction**

International criminal justice is at a cross-roads.

With the first indictments before the International Criminal Court the challenge is now whether the court will follow simply the legality determined through the international criminal tribunals, or develop a new jurisprudence to promote world order and a peaceful global community.

The differential emergence of international criminal justice has seen preferred and hegemonic procedural traditions exert disproportionate influence over the institutional development of formal global justice processes. Competing explanations for the origins of trial-based international criminal justice selectively emphasise either trial-based or alternative justice paradigms. Even so, it is increasingly becoming recognised that the new and legitimate constituency for international criminal justice are 'victim communities'.<sup>1</sup> As such there is a need to transform international trial processes better to reflect legitimate victim interests.<sup>2</sup> Along the way to achieving this there will be necessarily an expanded role for judicial and prosecutorial discretion to manage the greater range of non-

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\* Professor of Criminal Justice, Faculty of Law, University of Sydney; Professor of Law, Law School, Singapore Management University. The article addresses challenges both to Asian jurisdictions in a global context, and for Asian jurisdictions in influencing the development of international criminal justice. While the principal central and east Asian jurisdictions of China and Japan are the empirical locus of the paper, they represent common challenges for hybrid procedural traditions outside the European mainstream and in essential transition in the context of modernisation.

<sup>1</sup> For a detailed discussion of this and its problematic procedural ramifications for the transformed trial, see Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice* (Palgrave, 2010) ch 3. It is not necessary to see the victim focus theme, and the later discussion of communitarian justice as one and the same challenge. Victim-centred ICJ may be fostered through communitarian ethics and organisation, but it more specifically requires a legal/procedural location to achieve its full potential.

<sup>2</sup> Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Willan Publishing, 2005).

adversarial outcomes that will characterise the transformed trial.<sup>3</sup> This paper discusses briefly the procedural opportunities offered by Asian hybrid criminal justice traditions such as China and Japan where some of the central elements for the transformed international trial already have purchase. In addition, the paper reflects on the reconsideration of rights at the heart of due process in a more procedurally rich fair global trial.

The paper commences by summarising the different frameworks for international criminal justice in which China's influence can be measured, or should be present. The analysis looks specifically at procedural traditions on which international criminal law and its jurisprudence are said to be based. Understanding China as a transitional hybrid criminal justice model undergoing radical transformation in its justice delivery and discourse may assist significantly in forecasting where the synthesis of international criminal procedure may be heading. Attached to a re-interpretation and critique of individualised liability is the unpacking of China's in principle commitment to communitarian rights and social protection as a foundation for its criminal justice model. How might a similar normative direction influence the diversification and 'rights' perceptions of international criminal justice? In particular, in today's China, which is experiencing a rapid and relentless reconfiguration of communitarian identity and obligation, will collective rights commitments survive to influence the development of domestic criminal justice?

From a more formalist consideration of international criminal justice, the paper moves out to examine what the 'alternative' global justice paradigms offer China, and vice versa. This is a platform from which to speculate on the opportunities available to China in regional and international governance, through more constructive involvement with international criminal justice. As with China's active role in international commercial arbitration, there is potential for it to influence the development of international criminal justice beyond a formal institutional base. In some respects this perspective allows engagement with themes like adversarial justice and human rights, beyond rather narrow and irredentist normative debates around individuality, and enables some progress from constitutional legality to progressive communitarian practice.

Where the analysis moves to an examination of rights and international criminal justice we call for a wider consideration of rights paradigms in so far as they recognise community interests as well as individual integrity. The strain between these priorities provides insight into why certain nation-states such as China find it more difficult to administer domestic criminal justice in accordance with the rightful demands of international conventions.<sup>4</sup>

## II Why a 'China Focus' for Developing International Criminal Justice?

That China remains outside the constitution of the International Criminal Court (ICC) and is not yet a State Party to the *Rome Statute*,<sup>5</sup> might challenge even the relevance of this question. The purpose of this paper is not only to argue that China is importantly positioned to influence international criminal justice in the future, but also that there are many aspects of international criminal justice (properly interpreted) where China can already have sway. To make this case it is crucial to unpack the essentials of international criminal justice in order that possible theatres of influence are more obvious. The first part of this paper is concerned with this challenge.

As argued in *Transforming International Criminal Justice*,<sup>6</sup> there are much more than formal institutions constituting international criminal justice. Misleadingly referred to as 'alternative justice paradigms', the 'truth and reconciliation' pathways and 'transitional justice entities', have greater influence and coverage over victim communities<sup>7</sup> than can be claimed by the international criminal

<sup>3</sup> Findlay and Henham, above n 1, chs 5, 6 and 7.

<sup>4</sup> Evidence of these tensions in the Chinese context, against instances of individual and institutional abuses of power and miscarriages of justice are described in great detail in Elisa Nesossi, 'Limits to the Protection of Suspect's Rights at the Pre-trial Stage: The PRC's application of criminal justice and human rights standards' (Research Report, 2007) (copy on file with author).

<sup>5</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*'). This is the empowering legislation for the International Criminal Court (ICC) settled by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

<sup>6</sup> Findlay and Henham, above n 2.

<sup>7</sup> This notion is explored in *ibid* ch 8. It invites consideration of international crime victimisation beyond individual harm or even generic notions of 'humanity'.

tribunals. Bearing this in mind, international criminal justice should not just be seen within a retributive framework. Restorative justice has also emerged as an important and legitimate expectation of victim communities.<sup>8</sup>

What remains of communitarian control frameworks still influential locally in China today,<sup>9</sup> and the normative emphasis on 'social harmony' as a primary motivator for Chinese criminal justice they could be said to complement, suggest important potential cohesions with the development of restorative and less formal international criminal justice. The possibilities presented for China to influence the development of international criminal justice from this platform, are critically evaluated.

International criminal justice is employed increasingly, often following armed struggle, as a supplementary governance strategy for state reconstruction. Central to global governance in its current configuration is the nexus between crime and risk, control and security.<sup>10</sup> Regional and international concerns over risk and security where dominant global alliances now determine to control international terrorism are features of international criminal justice from which China, and indeed the tiger Asian economies, cannot exclude themselves.

### III Frameworks for International Criminal Justice

While international criminal justice — if we narrow it down to the arena of war crimes tribunals — clearly originated as a response to human rights atrocities, the motives underlying its emergence are the subject of much debate. The argument divides around the essential protection of humanity from new crimes and harms which only a global justice response can satisfy, or a wider mandate employing international criminal justice to advance the dominant political hegemony. These motivations are not mutually exclusive, and in fact they are crucially interdependent if the protection of humanity is to devolve from persistent military intervention. The critics of this alliance suspect that the more independent aspirations for justice will be captured by a dominant political ideology designating the legitimate global community, and the citizens worthy of protection.<sup>11</sup>

#### *A International criminal justice — A genuine humanitarian response?*

Proponents of this view hold that the phenomenon of international criminal justice and its practical manifestations are rooted genuinely in a universal desire to protect human rights and to redress those that have been violated.<sup>12</sup> Several of the distinct justifications articulated by the Permanent Members of the Security Council (such as China) for the creation of the International Criminal Tribunal for Yugoslavia (ICTY), when translated into general terms, can be seen to constitute the normative motivations behind international criminal justice viewed as a genuine humanitarian response.<sup>13</sup> Even so, these general pronouncements are pregnant with complex and competing considerations to:<sup>14</sup>

<sup>8</sup> Mark Findlay, 'Activating Victim Constituency in International Criminal Justice' (2009) 3 *International Journal of Transitional Justice* 183.

<sup>9</sup> See Lena Zhong and Roderic Broadhurst, 'Building Little Safe and Civilised Communities: Community Crime Prevention with Chinese Characteristics?' (2007) 51 *International Journal of Offender Therapy and Comparative Criminology* 52 for a discussion of the pressures at work on communitarian control in the cities as China transforms economically, and the Chinese workforce breaks free of the household registration system.

<sup>10</sup> The nature and consequences of this nexus is analysed in Mark Findlay, *Crisis What Crisis: Legal Regulation in New Visions of Global Risk and Security* (Collumpton, Willan Publishing) (forthcoming).

<sup>11</sup> Mark Findlay, 'Terrorism and Relative Justice' (2007) 47 *Crime, Law and Social Change* 57–68.

<sup>12</sup> See, eg: Louise Arbour, 'Progress and Challenges in International Criminal Justice' (1997) 21 *Fordham International Law Journal* 531; Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1; David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473; Aurélien J Colson, 'The Logic of Peace and the Logic of Justice' (2000) 15 *International Relations* 51; Michael P Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millenium: Lessons from the Yugoslavia Tribunal' (2000) 49 *International Criminal Justice* 925; Javaid Rehman, 'The Influence of International Human Rights Law upon Criminal Justice Systems' (2002) 66 *Journal of Criminal Law* 510; A Clapham, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court' in P Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 30.

<sup>13</sup> These justifications are set out and discussed in Scharf, above n 12, 928–33.

<sup>14</sup> For a wider discussion of these see Mark Findlay and Clare McLean, 'Emerging International Criminal Justice' (2007) 18 *Current Issues in Criminal Justice* 457.

- (a) provide justice for the victims;
- (b) establish accountability for individual perpetrators;
- (c) facilitate restoration of peace;
- (d) develop an accurate historical record;
- (e) deter perpetration of atrocities elsewhere.

### ***B International criminal justice – A politically motivated response***

The contrary position, however, is that the commonly purported justifications above disguise less altruistic motivations — ‘Surely, international criminal justice also tells another story, one that is at least more ambiguous, more fraught with power’.<sup>15</sup> At the heart of this view is the disbelief that these reasons above provide an adequate answer to the question: ‘why would states ever bother to create institutions that might end up turning against them ...?’<sup>16</sup>

In support of a more sceptical stance, Megret and Scharf point to the fact that the ICTY was ‘remarkably under-funded’<sup>17</sup> during its first years in operation, ‘a toy in the hands of the great powers ... reined in whenever it showed signs of threatening the status quo’.<sup>18</sup> Yet despite these ‘dismal beginnings’,<sup>19</sup> the judges of the ICTY have ‘transform[ed] themselves into crusading diplomats’;<sup>20</sup> as such ‘a thorough mix of liberal legalism and realist interest is what characterize[d] the emergence and consolidation of international criminal justice towards the end of the twentieth century’.<sup>21</sup> It remains to be seen ‘how far international criminal justice’s “own momentum” will take it’.<sup>22</sup>

Local and international criminal justice both are revealed through their institutions and processes as much as it may be in the normative aspirations for its outcomes. With international criminal justice, however, the aims of formal justice uncomfortably escape into the communitarian expectations commonly held by alternate justice forms. Debate about the appropriateness of this cross over, and the manner in which it challenges the formal/informal justice demarcation has characterised the rather limited analysis of international criminal justice’s origination and development to date.<sup>23</sup>

#### ***1 Formal institutions at work***

As Scharf argues, ‘[i]t is one thing to create an international institution devoted to enforcing international justice; it is quite another to make international justice work’.<sup>24</sup> For some, that the ICC as the centrepiece of formal international criminal justice has no constabulary, no subpoena power and cannot sanction states directly in the event of non-compliance, may make this latter objective impossible to achieve.<sup>25</sup> Questionable enforcement capacity does not bode well for the proposed deterrent effect of the international tribunals and the ICC,<sup>26</sup> casting serious doubt on optimistic proclamations such as ‘[t]he real story of the new Court may actually be the crimes which never take place’.<sup>27</sup>

<sup>15</sup> Frederic Megret, ‘The Politics of International Criminal Justice’ (2002) 13 *European Journal of International Law* 1261, 1267.

<sup>16</sup> Ibid 1267.

<sup>17</sup> Scharf, above n 12, 934.

<sup>18</sup> Megret, above n 15, 1275.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 1277.

<sup>21</sup> Ibid 1281.

<sup>22</sup> Ibid 1282.

<sup>23</sup> Mirjan Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83(1) *Chicago Kent Law Review* 329; Findlay and Henham, above n 1, ch 8.

<sup>24</sup> Scharf, above n 12, 927.

<sup>25</sup> Eg, ibid; Mirela Roznovschi, ‘Book Review: Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium*’, (2003) 31 *International Journal of Legal Information* 120.

<sup>26</sup> Lowell Goddard, ‘The Globalisation of Criminal Justice: Will the International Criminal Court become a Reality?’ (2000) 7 *Canterbury Law Review* 452, 464 argues otherwise: ‘And even if only a few of the perpetrators of genocide, crimes against humanity, or war crimes are held to account, their examples may serve to deter others similarly minded, and that in itself will be a resounding victory for all humanity’. This view should be compared with the in-depth evaluation put forward by Wippman, above n 12, which concludes the uncertainty of the deterrent effect.

<sup>27</sup> Clapham, above n 12, 67.

For Colson, '[t]he starting point [in responding to this question] is to conceive of international justice as a process which in itself has significance, no matter what the expected outcomes of the process are'.<sup>28</sup> In general, international tribunals ensure that collective assignation of guilt is avoided.<sup>29</sup> The overall effect then is one of catharsis.<sup>30</sup>

Akhavan provides support for the view of international criminal justice as manifest beyond the trials conducted in its name. He argues that the mere 'stigmatization of criminal conduct may have far-reaching consequences, promoting post conflict reconciliation and changing the broader rules of international relations and legitimacy'.<sup>31</sup> Akhavan also agrees with Colson that the international tribunals play a valuable role for victims in ensuring that the crimes against them 'do not fall into oblivion'.<sup>32</sup> In these ways, international criminal justice manifests itself in a 'significant contribut[ion] to peace building in post war societies' and through the introduction of 'criminal accountability into the culture of international relations'.<sup>33</sup> Notably these achievements correspond to the broader justifications for the creation of the international tribunals.

International criminal justice is also declared in national criminal law. Booth proposes that the function of an ICC trial will be 'first and foremost a proclamation that certain conduct is unacceptable to the world community'.<sup>34</sup> This proclamation has already been made, and continues to be made, with domestic legislation having been enacted worldwide bringing the national criminal law of more and more countries into line with the *Rome Statute*. Each such enactment represents a step closer to Clapham's 'trans-national legal order'.<sup>35</sup> Whether this translates into the internationalisation of criminal justice for a 'global' (as opposed to parochial) community remains to be seen.

## 2 *Alternative paradigms in the gap*

Certainly international criminal justice is not purely the domain of international trial institutions and the processes which flow, or are purported to flow, from them. Expansive efforts to create an international criminal justice outside the framework of criminal prosecution are identifiable, the South African Truth and Reconciliation Commission (TRC) being a celebrated example. In the South African case, amnesty was offered in return for 'full disclosure of all the relevant facts relating to acts associated with a political objective',<sup>36</sup> — as Dyzenhaus points out, this led some to believe that justice, seemingly being unlikely to be achieved given the continuing strength of the old regime, had been traded for the truth.<sup>37</sup> The opposing view is that justice was not negotiated, or sacrificed, but rather 'the way the TRC went about finding out the truth achieved a kind of justice different from — even superior to — criminal or retributive justice',<sup>38</sup> namely restorative justice. While this latter view is arguably the more convincing of the two, perhaps its most pertinent point is the implied dichotomy of criminal/retributive justice and restorative justice.

In any such analysis, the two seem to be posited as mutually exclusive, incapable of happy coexistence. In the context of international criminal justice, it has been established this dichotomy is false.<sup>39</sup> A comparative exploration of the objectives underlying both the 'formal' institutional attempts at international criminal justice and the 'informal' *community* approaches shows, not only that the two can, with institutional transformation, coexist in a transitional context, but that there is also significant scope for restorative themes to be incorporated into the procedural framework of international trials.

<sup>28</sup> Colson, above n 12, 58.

<sup>29</sup> Ibid; C Booth, 'Prospects and issues for the International Criminal Court: lessons from Yugoslavia and Rwanda' in P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 185.

<sup>30</sup> Colson, above n 12, 59.

<sup>31</sup> Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid 9.

<sup>34</sup> Booth, above n 29, 178.

<sup>35</sup> Clapham, above n 12, 65.

<sup>36</sup> *Promotion of National Unity and Reconciliation Act 1995*. Cited in Cassese, above n 12, 4.

<sup>37</sup> David Dyzenhaus, 'Judicial Independence, Transitional Justice and the Rule of Law' (2003) 10 *Otago Law Review* 345, 366.

<sup>38</sup> Ibid.

<sup>39</sup> Findlay and Henham, above n 2, chs 7 and 8.

### 3 *Justice for Victims? Focus for emerging international criminal justice*

For those victims who do testify as victim witnesses at international criminal tribunals, what is the impact of having their stories selectively constructed, destroyed, and reconstructed in examination and cross-examination? Not only are their experiences distorted, but they are taken out of their hands completely and retold through the voice of professionals. This loss of ownership, along with the procedurally-enforced restraints preventing the accurate telling of their stories, will more likely lead to increased frustration and dissatisfaction for victims than it will to catharsis. They will not feel, as Colson argues they will, that their status as victims is 'being taken seriously by the international community through one of its institutions'.<sup>40</sup>

When notions of individualised criminal liability are employed in contexts where the collective rights of victims have little actionable purchase, the outcomes can be a process of further victimisation through justice interventions and its consequences. As the experiences of the truth and reconciliation commissions reveal<sup>41</sup> the compromise of the individual rights of the 'storyteller' for the greater good of story telling requires a wider recognition of the legitimate interests of victim communities. Through an emphasis on community wellbeing as an objective for criminal justice, the hybrid justice traditions such as China hold out in principle at least a model for alternative justice strategies not to ride rough shod over victims' rights in the pursuit of reconciliation and state reconstruction.

Despite the recognition that alternative paradigms representing international criminal justice are very significant when conceptualising its scope, it is the form and jurisdiction of the international justice institutions and the ICC in particular which has divided many of the super powers such as China, from the body of UN states working towards a powerful and pervasive international criminal court.

## IV China and the ICC<sup>42</sup>

Placing aside Japan, of the global powers the three states currently refusing to cooperate with the ICC (Russia, the USA and China) have the largest military capacity in their regions. Burns does not see this as a coincidence. Despite the domestic legal obligations required by the *Rome Statute* and concerns over the loss of autonomy which these may suggest:

As an emerging military 'superpower', China has much in common with the United States in its wariness towards the ICC. In both cases these states have powerful military establishments that have developed their own military judicial systems that they will not easily give up any part of.<sup>43</sup>

However, Lu and Wang<sup>44</sup> observe that unlike the USA, China does not have extensive overseas military commitments and therefore it is not so concerned (as is the US) that its troops may one day come under the ICC jurisdiction. Also, China is not in the same international position as is the USA to pressure through economic sanction, for the creation of bilateral agreements indemnifying troops against local prosecution.

When the *Rome Statute* was signed by an overwhelming number of UN member states, China was unexpectedly one of the seven countries to vote against it. China remains among the very few states not to sign, ratify or accede to the treaty.<sup>45</sup> What makes this all the more curious is that China was active in the plenary sessions of the Rome Conference and adopts a watching brief on the progress of the courts development, from the perspective of an observer state.

The reasons set out by the Chinese government for not joining the ICC are:

1. The *Rome Statute* is not a voluntary acceptance instrument and imposes obligations on nation states and non-state parties without their consent, which violates the *Vienna*

<sup>40</sup> Colson, above n 12, 58.

<sup>41</sup> Jeremy Sarkin, 'The Truth and Reconciliation Commission in South Africa' (1997) 23 *Commonwealth Law Bulletin* 528.

<sup>42</sup> See Lu Jianping and Wang Zhixiang, 'China's Attitude towards the ICC' (2005) 3 *Journal of International Criminal Justice* 608.

<sup>43</sup> Peter Burns, 'Some Features of the International Criminal Court' (Paper presented at Canada China Procuratorate Reform Cooperation Programme, Xi'an, Shaanxi Province and Lanzhou, Gansu Province, August 2005) 3.

<sup>44</sup> Ibid.

<sup>45</sup> Even the US has reluctantly signed on.

*Convention on the Law on Treaties*. Furthermore, the complementary jurisdiction principle gives the ICC the power to judge whether a state is willing or able to conduct proper trials of its own nationals.

2. War crimes committed in internal armed conflicts fall under the jurisdiction of the ICC. The definition of war crimes goes beyond that accepted under customary international law.
3. Contrary to the existing norms of customary international law, the definition of 'crimes against humanity' does not require that the state in which they are committed be at war. Many of the actions listed under that heading should be covered by international human rights law and not criminal law.
4. The inclusion of the crime of aggression within the jurisdiction of the ICC weakens the power of the UN Security Council; and
5. The power under art 15 for the Prosecutor to initiate action (*proprio motu*) might make it difficult for the ICC to deal with the most serious crimes, and may tend open up the court to political influence.

These arguments are the subject of wide-ranging and sometimes critical discussion among Chinese jurists and legal scholars.<sup>46</sup> Lu and Wang have presented detailed argument challenging the currency and cogency of each. They conclude that, '[i]nstead of opposing the ICC, China should participate in order to protect its national interests'.<sup>47</sup>

Rather than deal with each of the arguments against China's reasons, it might therefore be useful to focus on those where its national self-interest is a clear motivation:

- The purpose of the ICC is to punish 'crimes against humanity'. There is no reason beyond the political why such a motive should be limited in its impact and direction to situations of war. 'Crimes against humanity' do not take on their abhorrent characteristics from the theatre of war alone. The definition of war in international law may not cover those contexts of armed conflict internal to state sovereignty and transition, where in many of these atrocities are committed which are exactly what the ICC was set up to prosecute.
- The doctrine of complementarity protects those states with the capacity properly to investigate and prosecute crimes that otherwise come to the attention of the ICC. This is the challenge. Judicial sovereignty is not an essential casualty of the limited submission of autonomy required by ICC membership: only where the states concerned have inadequate domestic criminal justice responses.
- It is only state parties to the *Rome Statute* that will be involved in the discussions determining the definition of crimes of aggression.
- Candidates for positions of judges and prosecutors with the court can only be drawn from state parties.

## V Procedural Traditions for International Criminal Law – China's Place?

In discussing the influences behind the development of international criminal law Martinez identifies:

- (1) International humanitarian law and the laws of war
- (2) International human rights law
- (3) Domestic (national) criminal law and procedural traditions; and
- (4) Trans-national and regional justice.

In her own words:

What we have ended up with are people coming from these different backgrounds, bringing with them different ideas about the role of law in protecting human rights. For example, criminal law is concerned with protecting the defendant's rights and with individual guilt. International human rights law, on the other-hand, is very victim focused ... in contrast to the rule of lenity of criminal law, where you're going to construe prohibitions narrowly so that you're not catching people unawares as defendants, in human rights law the corresponding interpretative canon is to interpret

<sup>46</sup> Lu and Wang, above n 42, n 9.

<sup>47</sup> Ibid 618–19.



human rights more expansively to protect the rights of individuals. In international criminal law you can see the confluence of these two strands. Sometimes they move together in a positive direction, and other times there is tension.<sup>48</sup>

The development of international criminal law and the procedural jurisprudence on which it relies is steeped in the compromise of the major legal traditions. None of the criminal procedural traditions remains 'pure' as a consequence of modernisation and colonialism. Hybridity is the catchword for procedural development in domestic criminal justice. As such, hybrid traditions should be the drivers of institutional and procedural international criminal justice. As such, international criminal law and its procedures, if they are truly to reflect a mix of major national traditions, must exhibit the tensions inherent in the hybridisation phenomenon.

On tensions in procedural foundations Zhang observes:

The Chinese Criminal justice system is very different from western justice systems. Influenced by Confucian communitarian<sup>49</sup> ideology and communist philosophy, mass organisations at the grassroots level play a very important role in crime control.<sup>50</sup> Mediation committees and *bang jiao* groups exist in nearly every local community to deal with minor deviancies, resolve conflicts, and rehabilitate juvenile delinquents and released offenders. While the formal criminal justice system is used for more serious offenders, mass participation in conflict resolution and crime prevention is an integral part of the Chinese criminal justice system.<sup>51</sup>

In imperial China the Tang and the Qing Criminal Codes were notable and sophisticated. The central purposes of these codes were to punish those who violated the rule of order, and the value of good conduct. Leng and Chiu<sup>52</sup> argue that these traditional codes paid less attention to the protection of individual interests, than to the maintenance of social and political order. In this respect they were compatible in function to the more recent Chinese crime legislation. To some extent the Codes could be seen in conflict with Confucian legal theory which advocates ruling by moral education, with the law and its sanctions used only as the last resort. Punishment was still for the Confucianist the province of the state where moral education was rejected by the individual.<sup>53</sup>

The People's Republic of China was established as a socialist country in 1949. Since then, efforts have been made to enact basic laws concerning criminal justice administration. It was in 1979, after the anarchy of the 'Cultural Revolution', that the *Criminal Law* and *Criminal Procedure Law* were originally enacted. At the same time, laws concerning the organisation and function of the courts and public prosecution were also developed. Basic laws with regard to lawyers, arrest and detention of suspects, also have been established. With the return of Hong Kong, and then Macau as Special Administrative Regions within China, the criminal law now accepts to a limited extent the traditions of British and Portuguese criminal procedure and jurisprudence

The Chinese criminal law<sup>54</sup> takes the political ideologies of Marxism, Leninism and Mao Zedong as its guide. It proclaims that its tasks are to use criminal punishments to struggle against all counter-revolutionary and other criminal acts in order to safeguard the system of the people's democratic dictatorship and the smooth progress of the course of socialist re-construction. In the early days of the Chinese soviet, the legal traditions of the USSR were heavily influential. Prior to that, western European civil law traditions had influence over the development of legal principle. The

<sup>48</sup> Eric Nee, 'International Criminal Law: A Conversation with Professor Jenny S Martinez' (Winter 2006) *Stanford Lawyer* 35, 36.

<sup>49</sup> To make a simple causal connection between Chinese communitarian traditions and a complementary communist ideology, even if possible, would not be convincing for analysing contemporary Chinese criminal justice. The latter in its procedures, and the paradox between its due process language and its sectarian practice, advances state interests rather than any more communitarian hegemony.

<sup>50</sup> Eg, in the control of gambling see Mark Findlay and Ugi Zvekic, *Informal Mechanisms of Crime Control — A Cross Cultural Perspective* (UNSDRI, 1988); Mark Findlay and Ugi Zvekic, *Alternative Policing Styles: Cross Cultural Perspectives* (Kluwer, 1993).

<sup>51</sup> X Zhang, *A Restorative Justice Audit of the Chinese Criminal Justice System* (MSc thesis, London School of Economics, 2004) 2.

<sup>52</sup> Shao-Chuan Leng and Hungdah Chiu, *Criminal Justice in Post Mao China: Analysis and documents* (State University of NY Press, 1985).

<sup>53</sup> Chen Xiang, 'Community Policing Strategies: A Chinese approach to crime control' (2002) 12 *Policing Society* 1.

<sup>54</sup> This discussion of the historical development of Chinese criminal law and procedure is bare and basic. It is only intended here to serve as background for appreciating the contemporary tensions at work in Chinese criminal justice which foment a procedural hybrid with experience to inform similar challenges faced by nascent international criminal procedure.

impact of the laws of imperial China is perhaps most clearly survived in the institutional structures of Chinese criminal justice.

It took 30 years for the People's Republic of China to enact its first laws. Until 1979 there were no legislative legal standards to guide judges to try criminals. The criminal law takes the *Constitution* as its basis. Article 28 of the *Constitution* stipulates that:

The State maintains public order and suppresses treasonable and other criminal activities that endanger State security; it penalizes acts that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.<sup>55</sup>

The Chinese government revised the *Criminal Procedure Law* in 1996 and the *Criminal Law* in 1997.<sup>56</sup> The revisions promised increased protection for criminal suspects and defendants and a fairer trial process.<sup>57</sup> The amendments to the *Criminal Procedure Law* included an expansion of the right to counsel, a more meaningful role for defence attorneys during the pre-trial and trial stages, and other measures to address the problem of 'decision first, trial later' (*xian ding hou shen*). The amended *Criminal Law* abolished the provision on 'analogy' contained in the 1979 *Criminal Law*. Under this provision, a person could be punished for an act that was not explicitly prohibited by law at the time the act was committed by providing for punishment according to the closest analogous provision of the *Criminal Law*.<sup>58</sup> The revised *Criminal Law* also replaced 'counter-revolutionary' crimes with 'crimes of endangering national security' as part of an effort to depoliticise criminal law, at least on paper.

A wide discrepancy often exists in China between the law on paper and the law in practice. Criminal suspects and defendants frequently do not enjoy the enhanced protections found in the revised laws. Excessive pre-trial detention has not been stamped out. Legal representation, widespread as it now may be is compromised by regular instances where public security organs detain and punish active defence advocates. The presumptions of innocence, and against self incrimination, constitutionally accorded, and declared in the *International Covenant of Civil and Political Rights* (ICCPR) which China has signed, are common casualties in criminal justice delivery. Torture remains a feature of policing practice.

Although the revisions to the *Criminal Procedure Law* and the *Criminal Law* reflect progress toward internationally recognised criminal justice standards as set forth in the *Universal Declaration of Human Rights*, the ICCPR, and other international human rights documents, the administration of criminal justice in China has been criticised for falling far short of international standards.<sup>59</sup> These criticisms should be seen against the prominence given in China to communitarian over individual rights. In addition, the excesses of a one party state, and its functionaries with little regard for the law in practice, should not be confused with an institutionalised commitment to subvert international rights conventions.

Most legal scholars have not completely abandoned the idea of 'Chinese characteristics' or 'China's social situation' for explaining the actual discrepancies between the PRC's CPL and international standards, but they speak about it in quite flat and unconvincing tones. Moreover, they often identify China's retrograde legal mentality as one of the key factors that hinder legal progress and reforms ... (following on from the administration's recent denunciation of the excesses of public justice officials, the state) demonstrates its benevolence in its willingness to defend individual rights and it makes obvious to its citizens that criminal justice reforms are an actual 'Chinese necessity' and not an imposition from abroad. On the other side, in promoting

<sup>55</sup> *Constitution of the People's Republic of China*.

<sup>56</sup> *Criminal Procedure Law of the People's Republic of China* [Zhonghua renmin gongheguo xingshi susongfa] (People's Republic of China) National People's Congress, adopted 1 July 1979, revised 17 March 1996 ('*Criminal Procedure Law*'); *Criminal Law of the People's Republic of China* [Zhonghua renmin gongheguo xingfa] (People's Republic of China) National People's Congress, Order No 83, revised 14 March 1997 ('*Criminal Law*').

<sup>57</sup> See generally, Jonathan Hecht, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law* (Lawyers Committee for Human Rights, October 1996); Donald C Clarke, 'Wrongs and Rights: A Human Rights Analysis of China's Revised Criminal Law' (Lawyers Committee for Human Rights, December 1998).

<sup>58</sup> In theory, the abolition of analogy brings the Criminal Law into conformity with the principle of *nullum crimen sine lege* (no crime without law making it so), which is expressed in art 11 of the Universal Declaration of Human Rights: 'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed'.

<sup>59</sup> Congressional Executive Committee on China, *Annual Report 2002* <<http://www.cecc.gov/pages/virtualAcad/crimjustice/crimeannrept02.php>> at 29 June 2010.

ideas of proceduralism and respect of human rights, it internationally shows its goodwill to adhere to international standards.<sup>60</sup>

However, as Nesossi rightly observes, criminal justice reform in China cannot be entirely explained as an effort to enhance state legitimacy, domestically and internationally. Pressures coming out of rapid changes in Chinese social order, which in turn have increased the significance of crime and the fragility of conventional approaches to control, have required a re-interpretation of the relationship between the offender, the victim and state institutions. In addition, legal academics and professionals, as well as activists with a growing voice are pushing for rights-based reforms. Above all this, the Chinese compromise of individual rights and social security prevails negotiated as it will continue to be by the interests of the one party state.

The debate about the compliance of Chinese criminal justice in practice with international human rights will be distorted if taken exclusively from perspectives outside Chinese legal and social traditions. Both Confucian and Chinese communist philosophies emphasise order over freedom, duty over rights and group interests over those of the individual.<sup>61</sup> 'The main objective of the Chinese criminal justice system is to protect, first of all, the socialist order, and next, the people's personal rights.'<sup>62</sup>

The challenge for a relevant 'rights and justice' debate in China is to recognise the political force of collective and state interests over the protection of the individual, while not sacrificing the sharp edge of international human rights conventions. This is in light of the invitation to emphasise the significance of criminal justice in protecting the individual as well as the collective, through the *Constitution's* celebration of constitutional legality, and the invocation of the rule of law.

Article 3 of the Chinese *Criminal Law* provides that offenders 'shall be determined and punished ... in accordance with the law'. Besides art 33 of the *Constitution*, art 4 of the *Criminal Law* states, 'Anyone who commits a crime shall be equal in applying the law. No one is privileged to be beyond the law.' Article 5 equates punishment with the crime committed and the criminal responsibility to be borne by the offender.

When it comes to pre-eminent considerations of individual rights like that of the victim as an essential paradigm for international criminal justice, Chinese criminal law presents the rights of the individual (even victims) as subordinate to the public duty to control crime when there is a conflict between the two. This is despite provisions allowing for civil claims along with criminal prosecution. Provisions for victim participation in mediation and the trial process, as well as the opportunities for compensation,<sup>63</sup> mean that the protection of victim interests are in keeping with the intentions of the *Rome Statute*, the practice of the international criminal tribunals, and are consistent with international rights conventions. These are not merely symbolic balances against abuse of power and miscarriages of justice. For instance, the Supreme People's Court President Xiao Yang recently indicated that legal action by the public against government officials had risen in the past 6 years, with an average of 100 000 cases now being heard each year.<sup>64</sup> Echoing the concern of the Chinese Politburo Standing Committee about unjust official practice, a senior member said:

The Party and the country have attached great importance to administrative trial work. Administrative litigation plays an indispensable function in realising the rule of law, building a lawful socialist country, and forging a harmonious society.<sup>65</sup>

This said, the translation of constitutional legality in the form of due process into Chinese criminal justice is a suspect as the state's ideological commitment to communitarianism. 'One-party' state politics is not conducive to accountable justicial power particularly in a tradition of governance

<sup>60</sup> Nesossi, above n 4, 19–20.

<sup>61</sup> Leng and Chiu, above n 52, 171.

<sup>62</sup> Ibid 123.

<sup>63</sup> Article 14(6) of the ICCPR creates a right to compensation for miscarriages of justice. According to art 15 of the PRC State Compensation Law, victims can claim compensation if an investigative, procuratorial, judicial or prison organ infringes their rights by, among other things, wrongful detention or arrest without substantiated strong suspicion or sufficient incriminating facts.

<sup>64</sup> Irene Wang 'People's Legal Action on the Rise', *South China Morning Post* (Hong Kong), 30 March 2007, 8

<sup>65</sup> Ibid.

such as in China where historically and recently law is not above politics, or constitutional law superior to executive administration.<sup>66</sup>

## VI Alternative International Criminal Justice<sup>67</sup> – the Way Forward for China?

Some might say that to suggest China's traditional (normative) communitarian system of social order provides an alternative criminal justice paradigm of restorative justice through mediation that could be usefully applied in international criminal justice involves a categorical misunderstanding. First, traditional communitarianism has changed through single party communism, then to a greater extent in modern urban China and is now even under threat in China's modernist/materialist self perception. Second, even the traditional communitarian system privileged social order over the individual, in a way that enhanced the interests of the state, rather than, as we understand it, as a way of meeting the needs of civil society.

In the contemporary Chinese justice system, whether retributive or restorative, the state is even more dominant. This means that, rather than just considering the needs of victim and perpetrator, in China their needs are always subordinate to that higher authority. Therefore, how in such a state dominated justice system it is possible to see the genuine development of an 'alternative' system of international criminal justice, remains problematic. It is analytically dangerous simply to conflate the Chinese system, where the state is pre-eminent, with the essential elements of 'restorative justice through mediation' as we know it in the West and in international law, where the individual is preeminent.

As mentioned earlier, the alternative or non-formal justice paradigms are developing a significant dimension of international criminal justice. China claims a reliance on mediation-based communitarian criminal justice delivery at a local level. Despite the fact that this mode of criminal justice usually is applied to less serious offending, it offers possible processes of participation and of judicial creativity, on which both the formal and less formal international justice paradigms could at least critically reflect.

The restorative justice paradigm is where unique Chinese socio-legal traditions can be accountably displayed. On this perspective and its relevance to the Chinese culture, Braithwaite laments:

What a pity that so few Western intellectuals are engaged with the possibilities for recovering, understanding, and preserving the virtues of Chinese restorative justice while studying how to check its abuses with a liberalising rule of law.<sup>68</sup>

There have been, and still are powerful communitarian resolution practices available across the vast communitarian societies of China before and after the creation of the Communist Republic. These in essence represent the Confucian and communist ascription to social order above the individual and in this regard may be both critically evaluated as restorative, and yet criticised as outside the individualised rights environment of international human rights law, as well as conventional due process criminal procedure. Braithwaite notes that while the traditions of mediation have survived translation into the 'mass line' strategies of Maoist communism, the dangerous patriarchal and hierarchic communitarianism of Confucian social order also has prevailed. Does this have to be so? Is it not possible to maximise the humanitarian and harmonising potentials of *bang-jiao* where real reintegration replaces stigmatising shaming, as mass mediation takes the place of formal punishment?

Another important consequence of critically interrogating Chinese communitarian traditions in contemporary criminal justice is the consequent reconfiguration of the rights debate. As noticed earlier, Chinese criminal justice has been long denigrated for failing to protect the individual rights of

<sup>66</sup> In relation to judicial independence see Mark Findlay, 'Independence and the Judiciary in the PRC: Expectations for Constitutional Legality in China', in Kanishk Jayasuriya (ed), *Law, Capitalism and Power in Asia* (Routledge, 1999), 281–99.

<sup>67</sup> Of necessity, this third section of the paper can only be selective in drawing themes from recent Chinese criminal procedure which may resonate with the development of international criminal justice. The very formative jurisprudence of the ICC and the procedural difficulties it is confronting, can do no more than suggest very broad fields where influence from hybrid traditions is possible.

<sup>68</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 22.

offenders in particular. As with international criminal justice, however, this concentration on the individual tends to diminish the other significant rights consideration in criminal justice, which restorative models re-emphasise. Collective or communitarian rights considerations, important in Chinese mediation environments are also essential (if undervalued) in the confirmation of criminal justice internationally. The Chinese experience in valuing to even a diminishing degree the rights of the community might add important understandings to victim interests in international criminal justice.

Zhong and Broadhurst argue that Chinese communitarian crime prevention has a rich tradition.<sup>69</sup> In many respects it is the safety and social harmony of the neighbourhood which has motivated successful community crime prevention and social order programmes along with any consideration of victim protection or offender punishment. The crucial features of these programmes are their community organisational dimensions, the safety measures they incorporate (in collaboration with state organs), and their tendency to 'civilise' communities through moral education, the promotion of harmonious relationships, building community culture, and the purification of the environment.

Yet as is the case with so many societies experiencing rapid and radical socioeconomic change, the nature of Chinese urban communities is fast changing. The traditional bonds which join community sentiment around the household and the family are strained through the itinerant migration which rages as a consequence of economic transition. Crime and the fear of crime accompany these changes. The conventional communitarian controls which were once sufficient to ensure social harmony and keep crime in check are as much at risk as are the communities they support, and the positive social consequences which they could claim. In this respect, the potential for the Chinese experience to inform the communitarian dimensions of international criminal justice goes beyond modelling or cultural convergence. The threats to communitarian control at work in China today, their consequences for the transformation of community crime control, and the effective measures to minimise their negative intrusion gives a critical case study from which much can be drawn. Criminal justice procedures in all contemporary traditions are a progress to statist control. In that regard even hybrid procedures in transition stand opposed to communitarian alternatives. The re-introduction of a communitarian commitment into criminal justice local or global must be mindful of the subversion it will face from more formalist institutional and process forms. This is particularly so, when the legal profession has a unique investment in, and management of more formalist criminal justice.

For communitarianism to offer more than a didactic possibility from the critical experience of Chinese justice and social order (traditional or current) the Chinese need to rediscover, re-invigorate and institutionalise communitarian practice. In the face of a more individualised constitutionalised legality, and traditional social and community bonds under threat, this is a challenge for China as much as it is for international criminal justice. To take 'Chinese communitarianism', once institutionalised and tested, beyond a fine ideal for international criminal justice requires a critical re-evaluation of indigenous justice removed to the urban China of today.<sup>70</sup> With the Chinese involvement in international criminal justice being passive, reactive and regressive, there may be potentials to influence procedural development but the nature of that influence beyond a declaratory frame, remains moot.

## VII Integrating Hybrid Traditions<sup>71</sup>

The eventual and inescapable influence of Asian jurisdictions and their interpretations of social order and communitarian rights will draw the examination of developing international criminal justice into a wider cultural and political perspective. A consequence will be the invigoration of compatible aspirations for international criminal law and its development.

It is the argument of this paper that unique procedural, and rights-based opportunities (and reflective challenges) appear in some of the hybrid criminal justice traditions of Asia. However, this influence has been largely lost to date by the reluctance of some of those traditions to engage with the

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<sup>69</sup> Zhong and Broadhurst, above n 9.

<sup>70</sup> Lena Zhong, *Communities, Crime and Social Capital in Contemporary China* (Willan, 2009), ch 9.

<sup>71</sup> Rather than act as a conventional conclusion this section is intended as 'road-map' for integration. In that respect it considers in summary, potential procedural innovations which grow from the analysis of culture, custom and rights which more generally precedes.

ICC and thereby the development of a global criminal jurisprudence.<sup>72</sup> To swing this around politics in Asia will need to address:

- the political and economic value in engaging with the ICC;
- the opportunity to assert influence while world superpowers are ambivalent about ICC;
- the importance of a richer mix of criminal justice procedural traditions in international criminal justice;
- the significance for the development of domestic criminal justice through engagement with international criminal justice; and thereby
- the involvement in global governance through new conceptions of 'global community'.

Such engagement is pursued radically by Asian states when it comes to regional politics and international economic order. China is playing a powerful role in regional and international relations. As with China's eventual entry into GATT and the WTO, it is argued that a closer involvement in international criminal justice is matter of advancing rather than risking national interest through more influential positioning within global governance trends. Such a move would benefit China on a number of levels:

- An important role for the ICC is to promote the improvement of domestic judicial systems. As a consequence of the new constitutional legality and its ascription to the rule of law voiced through China's present *Constitution*, recent legislative developments in China have indicated a genuine commitment to raise the domestic institutions of justice to prominence within China's national governance framework. For instance the *Organic Law of the Peoples' Courts* in China is an attempt to confront the paradox of judicial independence in a one party state<sup>73</sup>. The new Criminal code and Criminal Procedure code, and their particular influence over the development of the legal profession in China, and the rights and responsibilities of trial participants can be nurtured through a closer association with the development of international criminal justice process;
- The ICC should not run counter to UN rights charters to which China is a signatory. Particularly with the developing jurisdiction over crimes of aggression China would be wise to take a prominent role in this emerging jurisprudence. However, beyond domestic concerns;
- China, as a developed exponent of restorative justice through mediation, and an exponent of transformed trial adjudication, can critically inform similar developmental trends in international criminal justice; and
- As a dynamic hybrid criminal procedural tradition, the Chinese experience of criminal law and process can assist in the formulation of a truly international and responsive criminal jurisprudence. This can be achieved, without the distraction of an over-emphasis on the challenges to individual human rights in the Chinese delivery of domestic criminal justice.

In any case, China is not an island when it comes to the development of its contemporary criminal justice practice. China has benefited from mutual cooperation programmes in the area of criminal justice. For instance, the Canada-China Criminal Justice Cooperation Programme is claimed to have significantly developed the procuracy.<sup>74</sup> Internally, the Implementing International Standards for Criminal Justice in China Project<sup>75</sup> shows that academic lawyers from three recognised Chinese law schools are concerned to address the practical challenges of bringing domestic criminal justice in practice to a level of international comparability. It is argued that this bilateral capacity building will make the achievement of a 'rule of law' context for criminal justice eventually attainable.

Essential for the achievement of re-integrative and communitarian justice aspirations in China and internationally, is *participation*. From a victim perspective in particular, access to the formal institutions of international criminal justice, and thereby a lack of genuine integration is a growing

<sup>72</sup> This refers primarily to the major Asian nations such as China and India. Japan, up until very recently, also remained outside the member states. To date 14 Asian jurisdictions have ratified the Rome statute, including South Korea and Cambodia.

<sup>73</sup> Findlay, above n 66.

<sup>74</sup> Vincent Yang, 'Working with Chinese Prosecutors: Sixth year of the Canada-China Criminal Justice Co-operation Program' (International Centre for Criminal Law Reform and Criminal Justice Policy, 2000).

<sup>75</sup> Implementing International Standards in Criminal Justice in China Project <[http://www.icclr.law.ubc.ca/china\\_iiscj/index.html](http://www.icclr.law.ubc.ca/china_iiscj/index.html)> at 29 June 2010.

indictment of international criminal justice in practice. Certainly in terms of grassroots engagement with victim's interests there is much that international criminal justice could draw from contemporary Chinese experience. In particular:

- (1) The processes of mobilising people to resolve social conflicts through mediation as a central plank of communitarian justice.
- (2) Enshrined victim's rights to participate, such as to make accusations, attend court and give evidence regarding the nature and extent of victimisation, question defendants in court, argue the facts with the defendant and have some influence over the investigation. In the Chinese Criminal Procedure Law, however, these rights are based on retributive rather than restorative values.
- (3) Article 170 of the *Criminal Procedure Law* enables victims independently and individually to prosecute crimes where their personal and property rights have been infringed. The court may also institute judicial mediation in instances of private prosecution. Under art 172 the judge has both the role of facilitating the victim and the offender to reach resolution and reconciliation, and if the parties cannot resolve the matter, to act as an arbitrator and to issue a verdict. The importance of this merging of restorative and retributive justice within the discretion of the judge and in the setting of the courtroom cannot be overstated for the future of international criminal justice. While currently in China the discretion of the judge in such deliberations is more directed to avoid formal determinations of the offender's criminal liability rather than compensating the victim or rehabilitating the offender, there is no reason why the development of this model in the international justice setting could not re-emphasise these other legitimate victim concerns.
- (4) Article 77 of the *Criminal Procedure Law* provides a formal opportunity for the victim to institute supplementary civil action against the perpetrator in parallel with the criminal proceedings. Interestingly, the same court will hear both the civil and criminal cases, and again may revert to mediation to resolve the compensation issue. If no agreement can be struck, the hearing of the civil claim is formally heard after criminal liability is settled. There is no provision for mitigating the offender's criminal responsibility (and consequent sanction) if compensation is agreed to. Without this, certainly at the international level, there may be insufficient effective inducement for adequate compensation to victim communities from state perpetrators in particular;
- (5) In addition to judicial facilitation through mediation, the offender can be incorporated into the facilitation process.
- (6) And crucially, in this cross-over of jurisdictional interests for the victim, the judge determines where his or her role as mediator ends and as adjudicator begins.

The 'danwei' (work unit) system in China is transforming to take account of the new workforce landscape. Neighbourhood and residents' committees remain in competition with the property management companies with their growing control over housing development in urban areas of China. Neighbourhood interests struggle against commercial priorities in order to maintain cohesive community-level control priorities. With the Chinese urban landscape transforming at an incredible rate over the past few decades, social control mechanisms such as mediation and *bang-jiao* are experiencing new and largely unexplored pressures. Even so, peoples' mediation (*tiao-jie*), is being supplemented by administrative and judicial mediation opportunities. The state and the community are being required to incorporate in a model which was once only a communitarian concern.

This unique case study of the exercise of judicial discretion over retributive and restorative process provides an empirical foundation for projections on transforming international trial decision-making. It also identifies the competing interests at work which may compromise the promise of mediation and other restorative forms within a rights framework that tries to respect individual and community interests.

Beyond China, other examples of procedural innovation open to the enhancement of international criminal justice include:

- Enhance the communitarian 'rights' focus of international criminal justice — (importance of social order and community justice — communitarianism and tolerance)

- Contribute to the development of a new international criminal jurisprudence — (new notions of collective liability and crim.org.)
- Offer procedural options for the incorporation of retributive and restorative justice (Chinese trial mediation)
- Show ways of expanding professional discretion in international criminal justice (Japanese prosecutorial interventions)

In a wider sense of rights re-imagining, the importance of conventionally communitarian cultures such as those which survive at least in the spirit of modern Asian societies, cannot be diminished as an influence in:

- Enhancing the wider ‘rights’ focus of international criminal justice, with the consequent importance for inclusive social order and community justice, more reliant on communitarianism and collective tolerance;
- Contributing to the development of a new international criminal jurisprudence, with unique notions of collective liability, criminal organisation and resultant responsibility;
- Offering procedural options for the incorporation of retributive and restorative justice through mechanisms incorporated into the modern trial such as conventional mediation; and
- Revealing institutional ways of expanding professional discretion in international criminal justice such as through formalised but flexible prosecutorial early intervention.

These themes assume that citizen participation will be evidence of criminal justice as a communitarian enterprise. Beyond the greater accountability (and consequent legitimacy) which such participation offers, the possibility of advancing victim interests will be more naturally achieved. Criminal justice participation divides between professional and stakeholder interest, and the involvement of the wider community as audience and authority. It is expected through directing international criminal justice to a victim constituency, victim interests will more effectively compete with professional expediency, and wider community participation will temper victim vengeance and contested self-interest. In all of this, international criminal justice, through a communitarian re-imagining will be a more genuine protector of global community rather than the present narrow sectarian hegemony driving international criminal procedure.

The reality of a shift in the risk security focus of globalisation as it moves from the war on terror to more generalisable climatic, health, sustainability, and economic and financial threats will be a search for more accommodating procedural justice models. In many ways the tiger Asian economies have weathered the pressures of catastrophic economic revolution and adjusted their regulatory frameworks accordingly. With the rest of the world their criminal justice procedural traditions must engage with global regulatory imperatives in the face of as yet unimaginable climate change: the new risk/security nexus. To equip such crisis regulatory engagement the transformation to global criminal justice must confront and incorporate the:

- New, urgent and relentless risk/security agenda with a developing/third world focus;
- More universalised cross-jurisdictional harm;
- Move from modernisation to economic/market security — role of the Asian ‘tiger’ economies;
- Recognition of pluralistic regulatory strategies where law may take a less prominent place — look at traditions where legality is complementary — rights communitarian;
- Challenge to neo-liberal governance model as the single and appropriate paradigm for global justice and world order.